United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-2137

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEON BUSH,

Petitioner-Appellant,

-against-

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.

Docket No. 77-2137

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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ARGUMENT

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ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the ruling of Wardius v. Oregon (412 U.S. 470) that a non-reciprocal notice-of-alibi statute violates due process is retroactively applicable to this case, in which the State exploited the non-reciprocal provisions of the former New York statute to enable it to present surprise rebuttal witnesses.

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable George C. Pratt) rendered May 25, 1977, dismissing petitioner's application for a writ of habeas corpus on its merits. Petitioner was convicted of felony murder and second degree manslaughter on September 22, 1971, in the New York Supreme Court, Kings County, and he is currently serving concurrent terms of 15 years to life and 15 years, respectively. By order dated September 28, 1977, Judge Pratt issued a certificate of probable cause and granted permission to proceed in forma pauperis. By order dated November 3, 1977, this Court appointed The Legal Aid Society, Federal Defender Services Unit, as counsel on the appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Petitioner Leon Bush was accused of the August 30, 1969, killing of Robert Wheeler in Brooklyn, New York. At the trial (The Honorable Hyman Barshay and a jury), the People established that Mr. Wheeler had been killed, and introduced a written and oral confession of petitioner. Petitioner's defense was alibi; the defense sought to prove that petitioner was in New Orleans with his family on August 30, 1969. At the

time of this trial, New York's notice-of-alibi statute had non-reciprocal discovery provisions* -- the People were authorized to demand a listing of the alibi witnesses and a summary of the alibi defense, without any requirement that they honor a subsequent defense demand for rebuttal witnesses and evidence. Relying on this statutory procedure, the People demanded and obtained petitioner's alibi witness list and produced several surpise rebuttal witnesses to petitioner's alibi witnesses; the rebuttal witnesses testified that they had seen petitioner in New York at times at which, according to petitioner's alibi witnesses, petitioner was in New Orleans. The jury convicted petitioner of felony murder and second degree manslaughter.

Throughout the state proceedings, petitioner argued that the non-reciprocal former notice-of-alibi statute constituted a deprivation of due process. His initial arguments were based upon the reasoning of Williams v. Florida, 399 U.S. 78 (1970), which had held a reciprocal notice-of-alibi statute constitutional with the strong suggestion that the reciprocity was essential to this approval. During the pendency of the appeal

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*The notice-of-alibi statute in effect when petitioner was tried was Code of Criminal Procedure §295-1. This statute was re-enacted in 1971, effective September 1, 1971, as Criminal Procedure Law §250.20. The latter remained in effect until the statute was amended, effective May 23, 1974, in accordance with the reciprocity requirements found in Wardius v. Oregon, 412 U.S. 470, 472 (1973). However, CPL former §250.20 was held unconstitutional as of June 11, 1973, the date of the Wardius decision, in petitioner's appeal to the New York Court of Appeals, People v. Bush, 33 N.Y.2d 921 (1973), cert. denied, 419 U.S. 848 (1974).

to the New York Court of Appeals, Wardius v. Oregon, 412 U.S. 470 (1973), was decided; this case held that an Oregon statute, in effect identical to New York's former statute, denied due process because it provided for non-reciprocal discovery rights. In deciding petitioner's appeal, the New York Court of Appeals found the former notice-of-alibi statute unconstitutional under Wardius v. Oregon, but held their ruling exclusively prospective and denied petitioner any relief (People v. Bush, 33 N.Y.2d 921 (1973)).

A. Pre-Trial Proceedings

The People filed their demand pertaining to petitioner's alibi defense on August 17, 1970. Counsel responded on August 19, 1970, seeking, inter alia, an order excusing petitioner from complying with the demand or directing the People to provide the defense with their rebuttal witnesses; the defense position was explained in the affidavit (at 4-6) as being based upon the unconstitutionality of the former New York statute due to its non-reciprocity, and Williams v. Florida, supra, was cited in support of that position. By order dated September 25, 1970, the court (The Honorable John R. Starkey) denied petitioner's requests to excuse compliance or to compel counter-disclosure. Petitioner complied with the order on November 2, 1970, listing 11 alibi witnesses (with their addresses) and indicating that petitioner would claim that he was in New Orleans on August 30, 1969.

Immediately after jury selection, on May 5, 1971, petitioner reiterated his opposition to the former New York statute on the grounds previously stated for the benefit of the trial judge, Justice Barshay (Justice Starkey had ruled on the pre-trial motion) (A.265-267).* The defense concluded by seeking an order for the names of the People's rebuttal witnesses, noting that the People were fully aware of what the defense alibi would be; the court declined the invitation following this colloquy with the Assistant District Attorney:

> THE COURT: From the context of fairness, is there any reason why you cannot do it, Mr. Levy?
>
> MR. LEVY: Your Honor, these are people who are known to the defendant; and the statute has written out that it is not required.
>
> THE COURT: He is attacking the constitutionality upon which I will not pass. I am not going to sustain that view. Have you got statements from these people?
>
> MR. LEVY: Formal statements, no. I have spoken to two of them. I took notes. I have spoken to another one over the telephone. I would ask the Court to direct me at this time not to disclose their identities. They are all known to the defendant. I assure the Court of that.
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> (A.267-268).

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*Numerical references preceded by "A" are to the state trial transcript. The transcript as well as the pre-trial motions referred to above have been made available for this Court's inspection.

B. Alibi Evidence and Rebuttal*

Petitioner introduced evidence that on August 30, 1969, he was in New Orleans, through his own testimony and that of his brother, Donald Bush, and through five interrogatories of family members and friends in New Orleans.**

Petitioner testified that he left for New Orleans, where his family lived, on August 28, 1969, travelling by train (A. 545). He had been living in Brooklyn since January of 1969 (A.547); and after spending August 28 through December 19, 1969, in New Orleans, he returned to Brooklyn (A.549). It was shown that in his grand jury testimony petitioner had not recalled when he left, conceding that it could have been in June or July, and that at the pre-trial suppression hearing, petitioner had said that he had gone to New Orleans "sometime in August;" he determined that the exact date of his departure

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*We have not summarized the prosecution or defense trial evidence relating to petitioner's confession since the question of the statement's voluntariness, advanced in the district court, is not raised here. We note that the statement was a confession (see A.323 et seq., 426 et seq.), that petitioner testified that he was coerced into adopting an untrue account by police beatings (see A.554-566), and that the People's witnesses denied having beaten petitioner (see A.594-609).

**Justice Starkey, in his order of September 25, 1970, granted petitioner's request pursuant to Code of Criminal Procedure, Chap. 4, §§636-657, for the issuance of a commission to take the testimony of the defense witnesses in New Orleans. William L. Krull, III, Esq., of New Orleans, was appointed, and defense interrogatories and prosecution counter-interrogatories were put to six witnesses and returned to the court and parties below. Donald Bush's interrogatory, one of the six, was not offered, since he testified.

was August 27 on the date of his trial testimony (A.568-571). He was in New York when Hurricane Camille hit (A.590).

Donald Bush testified that he lived in New Orleans and left for California to seek employment on August 16, 1969, arriving there August 17; he went to San Diego and Los Angeles, where two brothers lived, and left California on August 28 to arrive in New Orleans on August 29 (A.518-521, 529). He saw petitioner at about 1:00 p.m. on August 29 at their home; he recalled this because the trip to California had been his first, and he and petitioner spoke of how their two California brothers were doing (A.522).* He also saw petitioner the following day, August 30, at home and at their father's service station (A.523). He did not recall the last time he saw petitioner before he left for California (A.525, 528, 531, 540); in response to an interrogatory, he said that petitioner was in New Orleans within the two or three weeks prior to August 29 (A.539), which was when he was in California (A.539-540). He remembered seeing petitioner for a continuous period up through October 31, the night of Halloween (A.542).

Five interrogatories in lieu of live testimony were offered by petitioner: Helen Bush, petitioner's mother (A.454-462); Alfred Williams, petitioner's brother-in-law (A.462-469);

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*A Western Union receipt showed that Donald Bush had been wired money by his mother on August 28 in California; this is the money he used to purchase an airline ticket. The receipt was admitted in evidence (A.520-521).

Patsy Bush, petitioner's wife (A.469-500); Vivian Williams, petitioner's mother-in-law (A.501-508); and Gerald Richardson, petitioner's second cousin (A.508-516). These five witnesses all placed petitioner in New Orleans on or around August 30, 1969. Helen Bush remembered that petitioner was in New Orleans on the last few days of August, because he had gone to New York for the first couple of weeks of August and was there when Donald Bush returned from California (A.455). Alfred Williams stated that petitioner was in New Orleans during the month of August; his chief recollection pertained to the middle of the month, but he "probably" saw him on the last few days (A.464, 467). Patsy Bush said that petitioner was at home with her on the night of August 30; on August 26, he had obtained a copy of their baby's birth certificate and had done other chores in the latter portion of the month (A.470-471). Vivian Williams recalled that petitioner was in New Orleans on August 30 and was living next door to her, and she stated that petitioner helped her prepare for the storm (A.502). Gerald Richardson believed petitioner was in New Orleans on August 30, since he remembered seeing him continuously between the storm and Labor Day (A.509-510).

The People presented three surprise rebuttal witnesses to petitioner's alibi: Frank Rawitz, Della Curtis, and Miller Curtis.

Frank Rawitz owned a Brooklyn bar which petitioner frequented and in which petitioner cashed checks (A.610). He saw

petitioner twice during the month of August 1969, and on August 26, cashed a $65 check for petitioner (A.611-612). There was no cross-examination of this witness (A.612a-620).

Della Curtis owned an 11-unit rooming house at 104 Park Place in Brooklyn, and in July 1969, petitioner moved into the house (A.621-622). Mrs. Curtis saw petitioner all through the month of August and in September up until September 16. On September 16, Mrs. Curtis' husband put petitioner out of the house for failing to pay his rent (A.623-624, 631). For the remainder of September and in October, Mrs. Curtis occasionally saw petitioner on the street in the vicinity of her house (A. 625).

Cross-examination disclosed that Mrs. Curtis had been interviewed in November 1969 by a man who said he was from the City and was investigating Leon Bush, and that this man took notes of the interview, but the prosec tor disavowed any knowledge of the interview or the notes, and since Mrs. Curtis had no recollection of the man's name, the issue was left hanging (A.624-627). She first brought her story to the attention of the trial prosecutor three weeks prior to her testimony -- on May 10, 1971 -- at the urging of her husband, but the reasons for her timing and the basis of her contacting this prosecutor remained a mystery (A.627-630).

Miller Curtis, Della Curtis' husband, stated that Gerald Richardson was his tenant and that around July or August, petitioner and another moved in with him (A.635-636). They con-

tinued to live in the room until September 16 (A.638). Mr. Curtis also had occasion to see petitioner at the bar he managed, the one owned by Mr. Rawitz (A.635). During August of 1969, petitioner visited th bar two or three times a week, and Mr. Curtis saw petitioner a total of three or four times a week between August 15 and September 16 (A.637-638). He also saw petitioner in October and November (A.638-639).

On cross-examination, Mr. Curtis stated that his first conversation with the authorities about petitioner's presence in New York occurred the previous year and was with Officer McCarthy; Mr. Curtis did not know whether the officer had made notes of the interview, and McCarthy had not mentioned any such interview in his testimony (A.643). Mr. Curtis also disclosed that he had been interviewed by the prosecuting attorney several weeks prior to this testimony, and that the prosecutor had written the statement; at this time, the court ordered the prosecutor to permit defense counsel to inspect these notes (A.646). The writings disclosed that Mr. Curtis had told the prosecuting attorney that he had gone to Puerto Rico on August 27 or 28, 1969, a fact which Mr. Curtis characterized as a "mistake" and corrected to the same dates in 1970 (A.647). He realized it was a mistake when he arrived home from the interview; in his words, "I didn't do nothing about it" (A.648-649). He advised the prosecutor of the error on the date of his testimony (A.649).

C. State Appellate Decision

Petitioner appealed to the Appellate Division of the Supreme Court of the State of New York, Second Department, arguing, inter alia, that the non-reciprocal notice-of-alibi statute was unconstitutional, upon the reasoning of Williams v. Florida, 399 U.S. 78 (1970). The Appellate Division affirmed the judgment of conviction, 40 A.D.2d 591 (1972), without a written opinion.

On appeal to the New York Court of Appeals, petitioner again pressed this claim; additionally, Wardius v. Oregon, 412 U.S. 470 (1973), which had been decided during the pendency of petitioner's appeal, was advanced in support of his claim that the non-reciprocal statute was unconstitutional. On December 28, 1973, the Court of Appeals decided petitioner's case (People v. Bush, 33 N.Y.2d 921).*

The court held that, there being no significant difference between Code of Criminal Procedure §295-1 and the Oregon statute considered in Wardius v. Oregon, supra, the New York statute must be deemed unconstitutional. The decision then considered the question of retroactivity of this ruling; limiting its holding to cases in which the non-reciprocal notice-of-alibi statute had operated to compel one-sided (defense) disclosure and to allow the presentation of undisclosed prosecution rebut-

*The decision of the New York Court of Appeals is reproduced in its entirety as "C" of the separate appendix to petitioner-appellant's brief.

tal witnesses ("surprise witness cases") -- and expressly distinguishing cases in which failure to comply with the prosecution's demand for a witness list had resulted in preclusion of those defense witnesses ("preclusion cases") -- the court held:

> The statute operated only to deny defendant advance notice of the identify of these rebuttal witnesses, and to this extent to hinder his preparation to impeach, discredit or rebut their testimony. He was not, however, inhibited in his own opportunity by direct evidence to establish his alibi. The infringement of defendant's rights went only to a collateral though not unimportant issue. Thus, we conclude that on this record the operation of the rule did not go to "the very integrity of the fact finding process;" rather it touched on procedural fairness to defendant.[*]

D. District Court Decision

Petitioner filed his pro se application for a writ of habeas corpus in the United States District Court for the Eastern District of New York on September 10, 1976. The constitutionality of the former notice-of-alibi statute was again one of petitioner's points. Judge Pratt, to whom the petition was assigned, construed this claim as raising the retroactivity of Wardius v. Oregon. In a memorandum and order, Judge Pratt dismissed the petition on the merits.** On the question of

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*In a subsequent decision, People v. Morales, 37 N.Y.2d 262 (1975), the Court of Appeals held that the rule of Wardius v. Oregon should be accorded retroactive application in preclusion cases.

**The memorandum and order constituting Judge Pratt's decision is Document #7 to the record on appeal, and is reproduced as "B" to the separate appendix to petitioner-appellant's brief.

of retroactivity, he concluded:

> The only rebuttal witnesses who contradicted the trial version of Bush's alibi were a Mr. and Mrs. Curtis. They testified that in the summer of 1969 they had rented a room to Bush's cousin, Gerald Richardson, that Bush had shared the room with Richardson during the latter part of the summer, and that Mr. Curtis had been forced to evict Bush and Richardson on September 16, 1969, for failure to pay the rent. Since Bush had previously testified to his presence in New Orleans during the entire month of September, 1969, defense counsel cross-examined both Mr. and Mrs. Curtis. Significantly, however, at no time did defense counsel move for a recess or a continuance in which to prepare his cross-examination of any of the three rebuttal witnesses. See Green v. Fogg, 422 F.Supp. 1034, 1036 (S.D.N.Y. 1976). Nor is there now any allegation of specific prejudice incurred by petitioner as a result of the State's refusal to disclose the identify [sic] of these witnesses prior to their testimony. See Mayer v. Moeykens, 373 F.Supp. 649, 654 (D. Vt. 1973), aff'd, 494 F.2d 855 (CA2), cert. denied, 417 U.S. 926 (1974).
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> . . .
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> A. Purpose of the New Standard
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> ... Had application of the New York notice-of-alibi rule led to Bush's abandoning his alibi defense, the purpose of the Wardius doctrine might well have dictated a new trial, since the trial court's truth-finding function arguably would have been substantially impaired. See United States ex rel. Hairston v. Warden, 407 F.Supp. 524 (N.D.Ill.) rev'd on other grounds, 539 F.2d 713 (CA7 1976); People v. Bush, supra (dictum). Here, however, Bush was not deterred from presenting his alibi defense. Moreover, no continuance was requested, and no specific prejudice was then or has subsequently been alleged. Under such circumstances, the application of the unconstitutional notice provision in Bush's case should not be assumed to have "substantially" impaired the trial court's truth-finding functions....

B. Reliance

The Wardius doctrine was not clearly forecast by any prior decision of the Supreme Court. Indeed, in Williams v. Florida, 399 U.S. 78, 82 n.11 (1970), where the Court upheld Florida's reciprocal notice-of-alibi statute, it expressly noted that it was not deciding the constitutionality of N.Y. Code Crim. Proc. §295-1. Nor can it be said that the Wardius decision was clearly forecast by any trend of lower court decisions. Under such circumstances, legislative and judicial reliance on the New York notice-of-alibi provision was justifiable.

C. Effect of Retroactive Application

Because that reliance began in 1935 when the provision went into effect, the retroactive application of Wardius in cases such as this would almost certainly result in substantial interference with the administration of justice in New York, not to mention other states with similar statutes, e.g., Oregon and Illinois.

D. Conclusion

Since all three of the relevant criteria articulated by the Supreme Court indicate that Bush should not be allowed to benefit from retroactive application of the Wardius doctrine, his claim to the contrary is rejected.[*]

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*The decision of the district court on the issue of retroactivity appears as Section X (at 16-22) of the district court memorandum and order, which is reproduced as "B" to the separate appendix to petitioner-appellant's brief.

ARGUMENT

THE RULING OF Wardius v. Oregon (412 U.S. 470) THAT A NON-RECIPROCAL NOTICE-OF-ALIBI STATUTE VIOLATES DUE PROCESS IS RETROACTIVELY APPLICABLE TO THIS CASE, IN WHICH THE STATE EXPLOITED THE NON-RECIPROCAL PROVISIONS OF THE FORMER NEW YORK STATUTE TO ENABLE IT TO PRESENT SURPRISE REBUTTAL WITNESSES.

The State's utilization of New York's former notice-of-alibi statute in this case to withhold disclosure of rebuttal witnesses while benefiting from full defense disclosure effected a substantial infringement of petitioner's due process rights. Due to the non-reciprocal nature of this statute, petitioner was unfairly confronted by several surprise rebuttal witnesses whose testimony, contradicting petitioner's alibi, was among the most damaging evidence presented by the prosecution. Had petitioner been given advance notice of these rebuttal witnesses, he would have been in the same position the prosecution had been vis-à-vis his alibi witnesses: he would have been able to formulate a meaningful trial strategy and/or conduct the necessary investigation upon which an effective cross-examination could be based.

The Supreme Court, in Wardius v. Oregon, 412 U.S. 470 (1973), recognized the unfairness inherent in such a non-reciprocal discovery statute identical to New York's former statute, and held that the enforcement of such a statute violated a defendant's due process rights. It was in petitioner's case before the New York Court of Appeals that New York followed suit

by declaring its statute unconstitutional. People v. Bush, 33 N.Y.2d 921 (1973), cert. denied, 419 U.S. 848 (1974). However, the Court of Appeals denied petitioner relief by declaring the ruling exclusively prospective from the date of Wardius v. Oregon in surprise witness cases (those in which the defense, by complying with the prosecution's demand for alibi witnesses, is permitted to present its alibi but is surprised by non-disclosed prosecution rebuttal witnesses).* The issue in this case, directly confronted by the district court, is whether the due process deprivation suffered by petitioner shall remain unredressed by exclusively prospective application of Wardius v. Oregon.

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*Federal courts generally make prospective rulings retroactive to the extent of permitting the litigant in the case in which the new constitutional procedure is announced to benefit from the ruling. In Stovall v. Denno, 388 U.S. 293, 301 (1967), the Court noted: "That they [litigants in case resulting in prospective ruling] must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." Though this reasoning would appear equally applicable to a state decision, the principle is grounded in Article III of the Constitution, which requires a case or controversy, see Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 930-933 (1962); the New York Constitution has no case or controversy clause, and New York courts are free to render advisory opinions. The reasoning which would support the policy of this limited form of retroactivity in prospective judgments (see Mishkin, Foreword, The Supreme Court 1964 Term, 79 Harv. L.Rev. 56, 60-61 (1965)) is sound but undoubtedly not a basis for habeas corpus relief.

A. Distinction between Preclusion and Suprise Witness Cases

A non-reciprocal notice-of-alibi statute, such as the Oregon statute construed in Wardius v. Oregon or the former New York statute which is involved in the case at bar, may operate in either of two ways: it can compel one-sided disclosure, which may result in unfair surprise to the defense, or it can preclude presentation of defense evidence, which constitutes an unfair limitation on the defense. Wardius v. Oregon was a preclusion case itself, but the decision suggests in no way that that form of unfairness is necessarily of greater moment than the unfairness of a surprise rebuttal witness. The Court noted:

> It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very piece of evidence which he disclosed to the State.
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> Id., 412 U.S. at 476; emphasis added.

The two guises unfairness may assume were viewed by the New York Court of Appeals as distinguishable for purposes of retroactivity analysis, and the district court has agreed.*

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*The district court observed: "Had application of the New York notice-of-alibi rule led to Bush's abandoning his alibi defense, the purpose of the Wardius doctrine might well have dictated a new trial, since the trial court's truth-finding function would have been substantially impaired [citations omitted]. Here, however, Bush was not deterred from presenting his alibi defense."

The conclusion that surprise witness cases do not warrant retroactive application of Wardius v. Oregon is premised on the belief that the fact- or truth-finding process is not seriously compromised by the preparation and cross-examination difficulties raised by surprise witnesses. Yet the reasoning of People v. Morales, 37 N.Y.2d 262 (1972), holding Wardius v. Oregon retroactive in preclusion cases, is applicable to a surprise witness case:

> A sine qua non of such a [fact-finding] process is the making available of relevant and trustworthy evidence which the parties seek to adduce in support of their respective contentions.... It is most relevant that the witness provisions of the Sixth Amendment are coupled with the one guaranteeing the right to counsel; right to counsel decisions are among those which have most commonly been deemed retroactive [citations omitted].
>
> People v. Morales, supra, 37 N.Y.2d at 269-270.

"[R]elevant and trustworthy evidence" is evidence which has been subjected to cross-examination (see Davis v. Alaska, 415 U.S. 308, 316 (1974)); and from the standpoint of constitutional prominence, the confrontation clause stands alongside the compulsory process clause. Though it is a direct and substantial interference with the fact-finding process to prohibit a criminal defendant from presenting alibi evidence, the inability to investigate a key prosecution witness and to structure effective cross-examination can prove equally devastating to the goal of truth determination.* Cf. Roberts v. Russell, 392 U.S.

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*It is noteworthy that the most severe preclusionary sanc-

298 (1968) (Bruton v. United States, 391 U.S. 123 (1968), held retroactive); Berger v. California, 393 U.S. 314 (1969) (Barber v. Page, 390 U.S. 719 (1968), held retroactive).

B. Application of the Three-Pronged Stovall Test

Stovall v. Denno, 388 U.S. 293, 297 (1967), formalized the three-pronged test first referred to in Linkletter v. Walker, 381 U.S. 618, 629 (1965), as follows:

> The criteria guiding resolution of the question [of retroactivity] implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect of the administration of justice of a retroactive application of the new standards.[*]

The first of the criteria -- the purpose to be served by the new standards -- is "foremost," and the factor upon which most cases focus. Desist v. United States, 394 U.S. 244, 249 (1969). And, "[w]here the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that sub-

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(Footnote continued from the preceding page)

tion operative in the Oregon statute tested in Wardius v. Oregon, the preclusion of the defendant's own alibi testimony for failure to comply with the notice-of-alibi provisions, is not effective in New York under People v. Rakeic, 289 N.Y. 306 (1942). Without this sanction, it cannot be said, as the New York Court of Appeals and the district court have implicitly suggested, that preclusion for non-compliance damages the fact-finding process more severely than unfair surprise after compliance with the non-reciprocal notice-of-alibi provisions.

*See Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. Shott, 382 U.S. 406 (1966).

stantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." Williams v. United States, 401 U.S. 646, 653 (1971). Application of the three criteria, with the proper emphasis and perspective on the purpose, demonstrates that retroactivity is required here.

Purpose. Wardius v. Oregon sought to correct a fundamentally unfair procedure whereby a defense intending to offer proof of alibi could do so only at the expense of being subjected to rebuttal proof for which it would be ill-prepared to respond. This decision, by requiring reciprocal disclosure of prosecution rebuttal witnesses, effected a significant change relating to fact-finding; it facilitated sound investigation and preparation for cross-examination of prosecution rebuttal witnesses and thereby afforded the defense a realistic opportunity to assess the rebuttal account, to seek independent contradicting or impeaching evidence, and to expose any fallacies in the testimony. The defense, in other words, can put the rebuttal witnesses to the test which Wigmore has called "beyond all doubt the greatest legal engine ever invented for the discovery of truth."* One-sided secrecy which impairs

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*Wigmore, as quoted in Lloyd Paul Stryker, The Art of Advocacy (1954) at 73. See also 5 Wigmore, EVIDENCE §§1365, 1367, 1395, 1397 (Chadbourn rev. 1974). The Supreme Court has recently expressed similar sentiments. Davis v. Alaska, 415 U.S. 308, 316 (1974); see also United States v. Fitzpatrick, 437 F.2d 19, 23 (2d Cir. 1970) ("Full and fair cross-examination is the cornerstone of the adversary system.").

cross-examination stalls this legal engine; Wardius v. Oregon, which eliminates this impairment, thus has had a substantial impact on the process of truth-determination.

In the case at bar, the two important rebuttal witnesses, Della and Miller Curtis, each left lingering questions as to the truth and accuracy of their testimony. Della Curtis first spoke with the prosecutor three weeks prior to trial, but asserted that she had reported her account to someone from the "City" a year and a half earlier and that notes had been taken by this person; but the prosecutor disavowed any knowledge of the interview or the notes. Mrs. Curtis' timing, her motivations, her honesty were all issues raised -- and left open -- by these disclosures, and they were all issues which could have been investigated and explored on cross-examination had there been adequate time. Miller Curtis' testimony raised even more serious questions. A written statement from an interview with the prosecutor -- given to the defense only after Mr. Curtis dislosed it on cross-examination -- showed that he stated he had gone to Puerto Rico on August 27 or 28, 1969, just a few days prior to the crime in question. He was able to neutralize the effect of this testimony, despite the fact that it was seriously inconsistent with his account of petitioner's activities, by claiming that his statement had been a mistake; had counsel had adequate time to investigate this matter, he might have been able to demonstrate that Mr. Curtis' entire account was untrue.*

*The district court correctly noted that petitioner did not

The facts of this case confirm that fully prepared cross-examination is essential to truth-elicitation and that presentation of a surprise witness all but forbids effective cross-examination. The district court cited counsel's failure to move for a continuance as evidence that the surprise was of no consequence, but that point ignores both the inadequacy of a continuance under the facts of this case and the adverse impression on the jury created by such a request. Whether or not truth was adduced as to the testimony of Mr. and Mrs. Curtis is, because of the severe handicap under which cross-examination was attempted, not a settled matter.

The accuracy of fact-finding in adversary proceedings emanates from the roughly equivalent procedural postures of the contestants (cf. In re Winship, 397 U.S. 358, 361-364 (1970)); thus, in Wardius v. Oregon, supra, 412 U.S. at 475, the Court remarked, "The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." The former statute, by placing the defense at a distinct disadvantage as to the cross-examination of the prosecutor's rebuttal witnesses, upset the requisite balance, leaving the defense ineffectual. See Roberts v. Russell, 392

(Footnote continued from the preceding page)

allege any specific prejudice. In any event, the State's failure to disclose its rebuttal witnesses resulted in grave prejudice for, as noted, cross-examination of the two important rebuttal witnesses could not be effectively mounted.

U.S. 298 (1968) (Bruton v. United States, 391 U.S. 123 (1968), held retroactive); Berger v. California, 393 U.S. 314 (1969) (Barber v. Page, 390 U.S. 719 (1968), held retroactive). Infringement of the right to counsel upsets this balance in a similar fashion; and the relation of an effective defense to truth determination is evident from the fact that right to counsel decisions have uniformly been held retroactive. E.g., McConnell v. Rhay, 393 U.S. 2 (1968) (Mempa v. Rhay, 389 U.S. 128 (1967), held retroactive); Gideon v. Wainwright, 372 U.S. 335 (1963) (held itself retroactive); Douglas v. California, 372 U.S. 353 (1963) (held itself retroactive); Hamilton v. Alabama, 368 U.S. 52 (1961) (held itself retroactive).

Reliance. Law enforcement authorities may not claim reliance in an unfair procedure when that procedure has never been expressly approved by the courts and when that procedure's demise has been "clearly foreshadowed" by a decision of the United States Supreme Court. Johnson v. New Jersey, 384 U.S. 719, 731 (1966); see Berger v. California, supra, 393 U.S. 314; cf. Desist v. United States, supra, 394 U.S. at 248.

Williams v. Florida, 399 U.S. 78 (1970), which petitioner advanced from the earliest stages of this prosecution to the moment Wardius v. Oregon was decided, anticipated the holding of Wardius. That the Court, upholding a reciprocal notice-of-alibi statute, was compelled to postpone ruling on a non-reciprocal statute such as New York Code of Criminal Procedure §295-1, does not establish that the Court's intentions as to such a statute were not foreshadowed. Justice White noted:

> Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant.
>
> Id., 399 U.S. at 81; footnotes omitted; emphasis added.
>
> * * * *
>
> We do not, of course, decide that each of these alibi-notice provisions is necessarily valid in all respects; that conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the state.
>
> Id., 399 U.S. at 82, n.11; emphasis added.

These comments leave little doubt that the Court viewed reciprocity in a notice-of-alibi statute to be essential to the statute's constitutionality.

It bears noting that any governmental reliance in this case was in conscious disregard of considerations of fairness. When the trial court asked the prosecutor whether, "[f]rom the context of fairness, is there any reason why you cannot [disclose your rebuttal witnesses]," the prosecutor declined the invitation and invoked the protection of the statute. Preservation of his ability to surprise the defense was a higher value than the "context of fairness." Moreover, it appears that Mr. and Mrs. Curtis were cultivated as witnesses only after the defense disclosed its witnesses and the details of its alibi. Thus, the State, having obtained a distinct benefit from a disclosure provision, sought to convert this into an advantage through non-disclosure. Though a non-reciprocal

notice-of-alibi statute may permit this result, this is not a legitimate purpose,* and utilization of the one-sided discovery tolerated by the former New York statute does not constitute justified reliance, but unfair exploitation.

Effect. The district court concluded that, because the non-reciprocal provision went into effect in 1935, "the retroactive application of Wardius in cases such as this would almost certainly result in substantial interference with the administration of justice in New York...." This assumption fails to take into consideration a number of factors which would severely limit the effect of a ruling in favor of retroactivity.

One major limitation is the restrictive factual context required to raise a genuine Wardius v. Oregon problem: (a) the State had to have served a demand for an alibi witness list, which is not invariably done in every case; (b) the defense had to have presented an alibi defense (unless precluded from doing so for non-compliance with the State's demand); (c) the State had to have presented a counter-alibi rebuttal witness who had not been disclosed to the defense. Further limitations pertain to harmless error and waiver: if it were shown that the defense

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*The State of Oregon did not advance the ability to obtain an advantage as a state interest in Wardius v. Oregon, and undoubtedly, the drafters of New York's former notice-of-alibi statute had no intention of creating an advantage. The purpose of the notice-of-alibi statutes, regardless of whether or not they provided reciprocal discovery, was to respect "the State's interest in protecting itself against an eleventh hour defense" (Williams v. Florida, supra, 399 U.S. at 81).

knew of the prosecution rebuttal witnesses independently, or were not seriously harmed by the testimony of those witnesses, there would be no basis for relief; and if the defense failed to seek disclosure of the State's rebuttal witnesses (or refused to disclose its own witnesses and suffered preclusion), any claim cognizable by Wardius v. Oregon would have been waived. Therefore, there is every reason to believe that few cases would be affected by a ruling that Wardius v. Oregon is retroactive and that the effect from such a ruling on the administration of justice would be minimal.

Furthermore, this Court need not, in this case, determine the retroactivity of Wardius v. Oregon to all preceding cases, including those that were final at the time the new procedure was announced by the Supreme Court. Petitioner is contesting the ruling of the New York Court of Appeals in his direct appeal that Wardius v. Oregon is fully prospective; a decision in favor of retroactivity may be restricted to cases which were on direct appeal on the date of Wardius v. Oregon if, for instance, the effect on the administration of justice of full retroactivity is deemed too substantial. (See Desist v. United States, supra, 394 U.S. at 257 (Harlan, J., dissenting)).

Conclusion. Each of the three Stovall criteria supports retroactive application of Wardius v. Oregon, and the first among these -- the purpose -- alone precludes wholly prospective application of the decision. Any reliance on the former notice-of-alibi statitue, at least since Williams v. Florida,

supra, has been somewhat disingenuous; the effect on the administration of justice, even if full retroactivity is announced, is likely to be minimal; and the purpose served by Wardius v. Oregon is to permit effective preparation for and cross-examination of prosecution rebuttal witnesses, which has a major impact on the truth-determining process at trial. This Court, it is respectfully submitted, should hold Wardius v. Oregon retroactive* and direct that the writ of habeas corpus be issued.

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*This Circuit has not passed on this issue, and the few cases that have appeared in federal courts have not yielded a definitive ruling on the retroactivity of Wardius v. Oregon. In Mayer v. Moeykens, 373 F.Supp. 649, 654 (D.Vt. 1973), the district court declined to hold Wardius retroactive in light of the lack of prejudice, features distinguishing the Vermont statute from the Oregon statute, and the liberal Vermont discovery rules; there was not a full-scale discussion of retroactivity. On appeal (affirmed, 494 F.2d 855 (2d Cir.), cert. denied, 417 U.S. 926 (1974)), this Court noted that counsel had conceded on oral argument that the argument had no merit and there was no discussion of retroactivity (494 F.2d at 859). In Jenkins v. Atkins, 515 F.2d 1078 (10th Cir. 1975), the court never reached the issue, for the case turned on an exhaustion question. In United States ex rel. Hairston v. Warden, 407 F.Supp. 524 (N.D. Ill. 1976), the district court held Wardius v. Oregon must be applied retroactively; however, that decision was reversed on other grounds (539 F.2d 713 (7th Cir. 1976)).

CONCLUSION

For the foregoing reasons, the order of the district court should be reversed and the writ of habeas corpus issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

January 13, 1978

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Stanley J. Bamert